In the Matter of

DATE: October 5, 1992

JEAN-MARC BOULET,
Employer

CASE No.: 92-TLC-14

Appearances:

PHILLIP D. BUCKLEY, Esquire
For the Complainant Employer

ANNALIESE IMPINK, Esquire
For the Respondent United States Department of Labor

Before: JULIUS A. JOHNSON
Administrative Law Judge

**DECISION AND ORDER AFFIRMING DENIAL OF LABOR CERTIFICATION**

This matter arises under the labor certification procedures of the Immigration and Nationality.Act, as amended by the Immigration Reform and Control Act of 1986, 8 U.S.C. .§ 1101 et seq. (1992) (hereafter, the "Act"), and the corresponding regulations for logging employment found at 20 C.F.R. § 655.200 et seq. (1992). Pursuant to 20 C.F.R. § 655.204(d)(2), complainant employer has requested expedited administrative-judicial review of the Regional Administrator's denial of its Application for Alien Employment Certification.

Complainant employer Jean-Marc Boulet, through his registered agent, filed three Applications for Alien Employment Certification February 22, 1992. (Administrative File (hereafter, "AF") 73, 99, 115) Complainant sought temporary labor certification to employ 18 aliens, representing 15 loggers, two operating engineers and one camp cook. (Id.)

On May 29, 1992, the Regional Administrator of respondent United States Department of Labor (DOL) notified complainant that DOL would not issue the requested labor certification because of numerous safety violations cited by the Occupational Safety and Health Administration (OSHA). (AF 20) DOL told employer that his application would be reconsidered upon submission of documentation that the safety violations have been resolved. (Id.) Following complainant's submission of additional evidence, the Regional Administrator reiterated DOL's earlier denial September 8, 1992. (AF 15) In accordance with 20 C.F.R. § 655.204(d)(2), complainant requested administrative-judicial review of the Regional Administrator's denial of his three applications for temporary labor certification September 22, 1992. (AF 3-8)

This matter has been reviewed according to 20 C.F.R. § 655.212. The decision and order that follows is based upon consideration of the entire administrative file and respondent's brief received October 1, 1992 and submitted as a memorandum of law in accordance with 20 C.F.R. §

655.214(b). No additional evidence was received into the record, as mandated at 20 C.F.R. § 655.212(a). The September 14, 1992 report of Mike St. Peter, received by the Regional Administrator September 17, 1992 after the Regional Administrator issued his decision, was received and considered as countervailing evidence according to 20 C.F.R. § 655.212(a).[1] (See AF 9-14)

The issue to be resolved is whether complainant has satisfied all conditions under the Act and is thus entitled to approval of any or all of his three separate applications for temporary labor certification, which would permit employer to hire 15 loggers, two operating engineers and one camp cook.

Employer Jean-Marc Boulet, an unincorporated proprietorship headquartered in the Canadian province of Quebec, operates as a logging contractor, harvesting-logs and timber in northwestern Maine, near the Quebec border. (AF 5, 63) Complainant asserts that it has been previously granted labor certification under 20 C.F.R. §§ 655.200-655.215. (AF5)

According to the Act,

> Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is excludable, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that
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> (I) there are not sufficient workers who are able, willing, qualified and available at the time of application for'a'visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor; and
> (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

8 U.S.C. § 1182(a)(5)(A)(i). As the party seeking labor certification, employer bears the burden of proof that the conditions under the Act have been satisfied. See 5 U.S.C. § 556 (1992).[2]

A prospective employer must provide the following with each application for temporary labor certification: (1) a copy of the job offer to be used for recruitment; (2) the assurances listed

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[1] According to 20 C.F.R. § 655.212(a), although the Administrative Law Judge may not receive additional evidence, "any co[u]ntervailing evidence advanced after the decision by the Regional Administrator shall be subject to provisions of 8 C.F.R. 214.2(h)(3)(i)." In construing this language most favorably for complainant and strictly against respondent DOL as drafter of this language, the administrative law judge has authority to consider evidence submitted to the Regional Administrator after issuance of Regional Administrator's decision and before the transmittal to the Administrative Law Judge. The limiting clause, referring to 8 C.F.R. § 214.2(h)(3)(i), has been disregarded as that particular section is irrelevant to this determination.

[2] According to the Administrative Procedures Act, otherwise provided by statute, "Except as the proponent of a rule or order has the burden of proof." 5 U.S.C. § 556 (1992).

at 20 C.F.R. § 655,203; and, (3) the specific estimated date workers will be needed. 20 C.F.R. § 655.201. The required assurances of 20 C.F.R. § 655.203 function as the employer's statement that the requested temporary labor certification would not contravene the Act.

The prospective employer must provide the following assurances: (a) that the job is neither vacant because of, nor at issue in, a labor dispute; (b) that for the duration of the period for which temporary labor certification would be granted, the employer will comply with all federal, state and local employment laws, "including employment related health and safety laws"; (c) that the job opportunity is open to all qualified United States workers without regard to race, color, national origin, sex, religion or disability status; (d) that the employer will cooperate with the employment service system in the active recruitment of United States workers; and, (e) that the employer will provide employment to any qualified United States applicant for the first half of the period for which temporary labor certification has been sought. 20 C.F.R. § 655.203.

The employer must comply with all occupational health and safety laws so that the alien employment will not adversely affect wages and working conditions of similarly employed United States workers, as required at 8 U.S.C. § 1182(a)(5)(A)(i). As employer has not provided realistic assurance of its intent to comply with federal health and safety laws, the requested temporary labor certification cannot be granted.

In a series of OSHA safety inspections, commencing November 6, 1992, employer was cited for 10 willful violations, 13 serious violations and six other violations under the Occupational Safety and Health Act, 29 U.S.C. § 651 et seq. (1992), and the corresponding regulations found at 29 C.F.R. Part 1910 (1992). (AF 22-69) The inspections were initiated in response to a fatal accident on November 5, 1991 in which an employee died of head injuries after being struck by a dead maple tree that had been left standing in a work area. (AF 63-64) Under 29 C.F.R. § 1910.266(c)(3)(ii), all dead, broken or rotted limbs and trees which present a hazard to employees must be removed prior to commencement of logging operations in their vicinity. (See AF 33-43) Nine of the 10 willful violations for which employer was cited were of this regulation.

According to OSHA'S Area Director, the agency's inspectors reported that Mr. Boulet told them the safety violations continued from the time of the first inspection in 1985 as "it is impossible to comply [with the regulations] and still -get the work done." (AF 65) The inspectors also reported that Mr. Boulet had neither held safety meetings nor distributed any safety literature or safety-related work rules to his employees, nor had he requested or required his supervisors to do so. (Id.) The inspectors continued that in regard to ,the company's practice regarding work in the vicinity of standing dead trees, Mr. Boulet "stated his men are not paid to cut down dead trees, they are paid to cut salable wood." (Id.)

In order to demonstrate his intent to prospectively comply with federal health and safety laws, complainant submitted a September 14, 1992 report from Mike St. Peter, a safety services consultant from Jackman, Maine, near the area of Mr. Boulet's logging operations. (See AF 9-14) In his report, Mr. St. Peter documented four safety meetings, two safety inspections during July 1992 and a planned schedule of monthly on-site safety inspections. (AF 9-10) Mr. St. Peter

reported that he provides employer with the following services: injury analysis; safety review; workers' compensation analysis; safety training; and workplace inspection. (Id.) No indication is given of when Mr. St. Peter's business relationship with employer commenced. (See id.)

Instituting a program such as that Mr. St. Peter purports to provide is a necessary but not sufficient criterion for this employer to assure DOL of its intent to comply with federal occupational health and safety laws. Given Mr. Boulet's pattern of safety violations, he has not carried his burden of proof regarding the necessary assurance of his compliance with such laws.

The record is absent any evidence of the stability of employer's business relationship with Mr. St. Peter, that is, whether Mr. St. Peter's services pre-date employer's latest OSHA citations, or whether Mr. Boulet is contractually obligated to continue Mr. St. Peter's program once temporary labor certification has been procured. But most importantly, the record is absent any indication from Mr. Boulet of a newly institutionalized attitude toward safety compliance following the latest series of OSHA inspections. For example, although Mr. St. Peter reported that employer is now conducting monthly safety meetings and on-site inspections, he listed only July meetings in his mid-September report, not indicating whether a monthly meeting or an on-site inspection occurred in August.

As employer has not carried his burden of proof in establishing he has met the requirements of the Act that would entitle him to the requested temporary labor certification, employer's three applications must be denied.

**ORDER**

The Regional Administrator's denial of complainant's three Applications for Alien Employment Certification is hereby AFFIRMED.

This decision and order shall be final and no further review shall be given to this temporary labor certification determination. 20 C.F.R. § 655.212(b).

JULIUS A. JOHNSON
Administrative Law Judge

Washington, D.C.
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